92-847

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JOHN L. HENSS,
JOHN L. HENSS, C.P.A., P.C.,
Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John L. Henss
John L. Henss, C.P.A., P.C.
Pro Se Petitioners
2190 - 82nd Street
Clive, Iowa 50325
515/276-3062

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QUESTIONS PRESENTED

The question is whether the Court of Appeals can base a finding upon mistakes in fact when the evidence clearly indicates otherwise.

The question is whether the Court of Appeals can appraise the testimony of a witness and to substitute its judgment for that of the trial court in the exercise of credible choices.

The question is whether the Court of Appeals can deny a party the right to due process of law as guaranteed by Article V, Amendment to the Constitution of the United States.

The question is whether a permanent injunction which deprives, or places severe limits on, a person's ability to pursue his means of livelihood constitutes cruel and unusual punishment which is prohibited by Article VIII, Amendment to the Constitution of the United States.

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LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable William H. Rehnquist, Chief Justice, and Associate Justices of the Supreme Court of the United States.

John L. Henss and John L. Henss, C.P.A., P.C., the Petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit entered in the above entitled case on June 3, 1992 and order denying petition for rehearing and suggestion for rehearing en banc which was denied on July 14, 1992.

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[1]Lynn Martin, Secretary of Labor, United States Department of Labor,
v.
Harvey N. Feilen; Armin P. W. Thielking; Paul W. Thielking; Stephen K. Thielking; John L. Henss; R & N Garage Company; Lakewood Marine, Ltd.; Paul W. Thielking, O.D., P.C.; John L. Henss, C.P.A.; Oden, Henss and Thielking; and Capital Resources Corporation.

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JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (Appendix C) was entered on June 3, 1992. A timely petition for rehearing was denied on July 14, 1992. The statutory provision believed to confer on this court jurisdiction to review the judgment in question is section 1254 of Title 28 of the United States Code.

STATUTES INVOLVED

Amendment V to the Constitution of the United States is involved and provides as follows:

> "No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VIII to the Constitution of the United States is involved and provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments be inflicted."

29 U.S.C. 1002(18) is involved and provides as follows:

"The term 'adequate consideration' when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by

the Secretary."

29 U.S.C. 1104(a)(2) is involved and provides as follows:

"In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title)."

29 U.S.C. 1108(a) is involved and provides as follows:

"The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

"(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such

participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

"(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor."

29 U.S.C. 1108(e) is involved and provides

as follows:

"Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)-

"(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

"(2) if no commission is charged with respect thereto, and

"(3) if -

"(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

"(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title."

C.F.R. 2550.408(e)(d) is involved and provides as follows:

"For purposes of section 408(e) and this section, adequate consideration means:

"(1) In the case of a marketable obligation, a price not less favorable to the plan than the price determined under section 407(e)(1) of the Act; and

"(2) In all other cases, a price not less favorable to the plan than the price determined under section 3(18) of the Act."

STATEMENT OF CASE

The United States District Court for the Southern District of Iowa had jurisdiction of this case pursuant to 29 United States Code section 1132(e)(1).

The District Court held that, "defendants are permanently enjoined from serving directly or indirectly as fiduciaries of any ESOP or ESOT, or any other employee benefit plan covered by ERISA." That court further held that, "the court finds that the evidence does not support any judgment for damages against the defendants by reason of the reduction in value of the stock of FMC."

The Court of Appeals held that, "on remand, the District Court must determine the specific damages that resulted from each of the transactions in which ERISA fiduciary duties were breached." That court also ruled, "we modify the permanent injunction against John Henss and John L. Henss, C.P.A., P.C. to further enjoin them from acting as a service provider to any ERISA

plan."

The Court of Appeals enumerated six transactions which they found to be subject to ERISA:

1. Transfer of an assumed obligation to ESOP in consideration for which the ESOP received 81 shares of FMC stock valued at $17,360 per share, "the full market value." (Op. P.10)

2. On October 1, 1981, the ESOP received 73 shares of FMC stock as the proceeds of a dividend paid by FMC. Those shares were "priced at the full market value of $17,360." (Op. P.11)

3. On November 1, 1981, FMC stockholders, except the ESOP, "exchanged their FMC shares for newly issued shares of Capital Resources Corporation (CRC), a corporation controlled by Henss."

4. On January 2, 1982, the ESOP sold 105.09 shares of FMC stock to CRC which "paid the ESOP $13,288.87 per share, again reflecting the 20 percent minority discount." (Op. P.11)

5. On January 4, 1982, "FMC paid a $2,900 per share dividend, declared prior to the CRC/ESOP transaction, that provided CRC approximately $300,000 in cash on shares it had just purchased at a discount." (Op. P.11)

6. The Court of Appeals held that, "After CRC assumed the Imperial debt, the ESOP continued to make the $21,014 monthly payments to Central Federal until January 1985." (Op. P.11)

The Court of Appeals wrote, "The ESOP paid too much for FMC stock purchased, sold FMC stock for less than its price in contemporaneous transactions, sold stock on the eve of large dividends, and paid CRC obligations without consideration." (Op. P.20)

The Court of Appeals further wrote, "on remand the District Court must determine the specific damages that resulted from each of the transactions in which ERISA duties were breached...such as paying CRC's debt to Central Federal for no consideration; from a profit wrongfully made, such as a fiduciary purchasing

FMC stock from the ESOP just before a large cash dividend was paid, without reflecting the dividend in the purchase price."

Finally, the Court of Appeals wrote, "Henss's trial testimony displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries. For example, Henss stated repeatedly his view that ESOP fiduciaries are exempt from ERISA's 'prudent man' rule when investing plan assets in an employer's stock or property."

REASONS FOR GRANTING WRIT

First we must look to the "damages that resulted from each of the transactions in which ERISA fiduciaries were breached." Because only transactions which were found to be subject to ERISA could possibly have related to the "fiduciary duties which were breached."

Of the six transactions enumerated by the Court of Appeals as being subject to ERISA the acquisitions of FMC stock by the ESOP of 81 shares and 73 shares were both found by that court to be traded at "the full market value." (Op. P.10)

ERISA exempts from prohibited transactions the "acquisition or sale by a plan of qualifying employer securities...if such acquisition...is for adequate consideration." (29 U.S.C. 1108(e))

Section 3(18) of ERISA (29 U.S.C. 1002(18) defines "adequate consideration" as "...(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in

accordance with regulations promulgated by the Secretary."

Department of Labor Regulations (29 C.F.R. 2550.408(e)) define the term "adequate considerations" as "a price not less favorable to the plan than the price determined under section 3(18) of the Act [ERISA]."

The Court of Appeals wrote, "most significantly, the accountants' valuations of FMC stock were found to be fair and reasonable." (Op. P.23)

In the instant case, the shares of stock in question were sold to the ESOP at "full market value." Such a sale is not prohibited if "for adequate consideration." The "fair market value of the assets as determined in good faith by the trustee" is "adequate consideration" and "the accountants' valuations of FMC stock were found to be fair and reasonable."

Accordingly, it is respectfully submitted that these transactions could not possibly fall within the punitive provisions of ERISA.

As regards the exchange of FMC stock for CRC stock, the Court of Appeals refers to CRC as "a

corporation controlled by Henss." (Op. P.11) There is no evidence in the record to show that Henss controlled CRC and, in fact, he did not control CRC, so it would be impossible for there to be such evidence because none is in existence.

As regards the sale by the ESOP of 105.09 shares of FMC stock to CRC the Court of Appeals stated, "CRC paid the ESOP $13,288.87 per share; again, reflecting the minority discount..." (Op. P.11) This is a mistake of fact as borne out by the record. The value of FMC stock as calculated by Oden, Henss and Thielking at December 31, 1981 was $13,671 per share. (Ex. D.16) Those valuations of FMC stock were found to be "fair and reasonable."

As regards the January 2, 1982 transaction, it has been demonstrated in the immediately preceding paragraph that the 105.09 shares of FMC stock were not "purchased at a discount." The purchase price was based upon "the accountants' valuations of FMC stock [which] were found to be fair and reasonable." Furthermore, the fact that the stock was purchased just prior to payment of a $2,900 per share dividend is of no significance

or consequence. The valuation of FMC stock, which was found by the Court of Appeals to be "fair and reasonable", includes as one of its components the stockholders' equity, or net worth, in the company whose stock is being valued. The payment of a dividend by a corporation reduces that corporation's stockholders' equity by one dollar for each dollar of dividend paid. Accordingly, had the stock been purchased after the dividend payment, its value would have been $2,900 per share less than the actual sales price.

As regards the ESOP continuing to "make the $21,014 monthly payments to Central Federal until January, 1985", the record shows that these payments were made by FMC, not the ESOP, for the benefit of CRC. (Ex. D.9) As such, the Court of Appeals would apparently find no fault based upon its holding that "FMC advanced approximately $930,000 to CRC between November 2, 1982 and January 10, 1985, recording the advances as receivables...none of these advances involved ESOP stock or assets." (Op. P.13) Furthermore, the evidence does show that CRC, or companies

which it controlled, paid to, or for the benefit of, FMC amounts totaling $3,940,997 (Ex. D-3 through D-6, Tr. 1278). It must follow that any unjust enrichment enjoyed by FMC directly benefited the ESOP which would demonstrate that no "waste of the ESOP's assets" (Op. P.11) occurred.

The evidence demonstrates that the ESOP did not pay too much for FMC stock purchased nor did it sell "FMC stock for less than its price." The purchase and selling prices were all determined by the same accountants whose "valuations of FMC stock were found to be fair and reasonable" by the Court of Appeals. The fact that stock was sold on the eve of large dividends did not affect the ESOP's financial well-being in any way. The evidence shows that "CRC obligations" were paid by FMC, not by the ESOP, and that CRC and others of its subsidiaries paid great sums to and on behalf of FMC.

The only "ERISA duties [which] were breached" as found by the Court of Appeals were "paying CRC's debt to Central Federal for no consideration; from a profit wrongfully

made...purchasing FMC stock from the ESOP...before a large cash dividend...without reflecting the dividend in the purchase price." All of the evidence shows that the ESOP did not pay CRC debts or anyone else's debts, as a matter of fact. The "fair and reasonable" method of valuation would have reduced the ESOP's selling price of the FMC stock if the dividend had been entered therein. It is respectfully suggested that in the absence of any breach of fiduciary duty there can be no fiduciary liability. As in Betts v. Brady, 1942, 62 S. Ct. 1252, 316 U.S. 455 86 L. Ed. 1595, the totality of the facts in the instant case demonstrate the denial of due process.

The Court of Appeals would enjoin appellant from being a service provider to any ERISA plan. It is respectfully submitted that such an injunction deprives appellant of his due process rights as guaranteed by Article V, Amendments to the Constitution of the United States which states, "No person shall...be deprived of life, liberty or property without due process of law;..." Black's Law Dictionary contains the

following definition, "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

Because the Court of Appeals did not have the opportunity to hear and observe the testimony by appellant it could only make its findings by reading the transcripts. It is suggested that the Court of Appeals presumed questions of fact against appellant and failed to grant due process.

As regards appellant and the injunctive relief, the Court of Appeals, on page 11 of its decision, refers to "Capital Resources Corporation (CRC), a corporation controlled by Henss." The facts of the case demonstrate that Henss did not control CRC either before or after

the transaction and, in fact, did not own any CRC stock at the time relevant to the context in which used.

Black's Law Dictionary defines "property" as "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal;..." Black's defines "due process" as, "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

This Honorable court has held, in Green v. McElroy, 1959, S. Ct. 1400, 360 U.S. 474, 3 L. Ed. 2d 1377, that the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the

"liberty" and "property" concepts of provisions of this clause that no person shall be denied liberty or property without due process of law.

The court held, in Barn Ballroom Co. v. Ainsworth, D.C. Va. 1946, 67 F. Supp. 299, reversed on other grounds 157 F. 2d 97, that the right of a civilian engaged in a legitimate occupation is a property right of which he may not be deprived, except by due process of law.

The court held, in U.S. v. Tropiano, C.A. Conn. 1969, 418 F. 2d 1069, certiorari denied 90 S. Ct. 1258, 1262, 397 U.S. 1021, 25 L. Ed. 530, that the right to pursue a lawful business, including solicitation of customers necessary to conduct of such business, is "property right" within protection of this Amendment and Amendment 14.

The question as to whether a person's means of earning his or her livelihood is property protected by the due process clause of the Constitution is obviously well settled.

The decision of the Court of Appeals would deprive Henss of that property without his being

heard on this issue and with his being deprived of the right of controverting every material fact bearing on that question. Because the Court of Appeals would override the trier of facts and thereby would deprive Henss of this property without granting to him the rights enumerated in the definition, it is respectfully submitted that due process of law, as guaranteed by the Constitution of the United States, is conspicuously absent in this case.

This Honorable Court, in Galvan v. Press, Cal. 1954, 74 S. Ct. 737, 347 U.S. 522, 98 L. Ed. 911, rehearing denied 75 S. Ct. 17, 348 U.S. 852, 99 L. Ed. 671, ruled that fair play is the essence of due process.

The court held, in Ruffin v. Housing Authority of New Orleans, D.C. La. 1969, 301 F. Supp. 251, that constitutional mandates that require federal and state governments to act only under due process of law mean that no governmental body, no governmental agency, and no governmental office, state or federal, may deprive a citizen of his life, liberty or property without observing elementary principles

of fair play.

It is respectfully submitted that when an attorney for the United State Department of Labor, cloaked with the majesty of the government of the United States, threatens counsel for appellant in an obvious attempt to intimidate appellant's counsel and to deprive appellant of representation, this is not fair play. In the absence of fair play it is not due process. Here we have an attorney of the United States government, representing a cabinet officer, attempting to coerce appellant's attorney. This is a gross departure from all principles of fair play.

It is respectfully submitted that when an attorney not a party to the proceedings, but whose partner represents one of the defendants, collaborates with the attorneys for respondent for the purpose of providing respondent irrelevant evidence taken out of context and from a deposition from an unrelated case, this is not fair play. In the absence of fair play it is not due process.

When respondent's chief witness, formerly a

defendant, but whom allegations against have been dismissed, suddenly is employed by the United States government there is an appearance of impropriety. If there is a relationship between his testimony and his newly found employment, this is not fair play.

This Honorable Court, in Betts v. Brady, 1942, 62 S. Ct. 1242, 316 U.S. 455 86 L. Ed. 1595, ruled that asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case.

This court held, in Palakiko v. Territory of Hawaii, C.A. Hawaii 1951, 188 F. 2d 54, that the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of the evidence, whether true or false. It is respectfully suggested that when the Court of Appeals relies upon tainted evidence produced through the unethical conduct of attorneys and when that court ignores evidence that demonstrated that the ESOP benefited by, rather than suffered from, the net cash flows, there is

an element of fundamental unfairness in the use of that evidence.

The court held in Pinedo v. U.S., C.A. Cal. 1965, 347 F. 2d 142, certiorari denied 86 S. Ct. 547, 382 U.S. 976, 15 L. Ed. 2d 468, that the determination whether due process demands are met requires decision as to whether, upon the whole course of proceedings, and in all the attending circumstances, there was a denial of fundamental fairness, and this is a question of judgment and degree. It is respectfully suggested that when the Court of Appeals finds no fault in the professional services provided to the ESOP, i.e., it's accounting records and valuations of employer securities, and when the evidence, supported by the Court of Appeals' analysis, demonstrates that no breach of fiduciary duty occurred, to invoke penalties with no support or basis therefor constitutes a denial of fundamental fairness.

In Dillon v. M. S. Oriental Inventor, 426 F.2d 977 (1970) it was held that except as to testimony which is inherently incredible, the Courts of Appeal do not substitute their judgment

for that of the trial court or jury in the exercise of credible choices.

In the instant case, the Court of Appeals held that "the District Court abused its discretion in not further enjoining Henss from acting as a service provider to ERISA plans." In Delano v. Market St. Ry. Co., C.C.A. Cal. 1942, 124 F.2d 965 the court held that judicial action which involves "discretion" which is the power exercised by courts to determine questions to which no strict rule of law is applicable, but which from their nature and circumstances are controlled by the personal judgment of the court is final and cannot be set aside on appeal except when there is an abuse of discretion. To find "abuse of discretion" in the instant case it was necessary for the Court of Appeals to take certain testimony out of context.

The Court of Appeals states, "We modify the permanent injunction against John Henss and John L. Henss, C.P.A., P.C. to further enjoin them from acting as a service provider to any ERISA plan." (Op. P.25) It is respectfully suggested that a permanent injunction constitutes cruel and

unusual punishment as prohibited by Amendment VIII to the Constitution of the United States. Referring to said Amendment, the court, in Dembowski v. State, 240 N.E. 2d 815, 251 Ind. 250 (1968), held that this Amendment impliedly requires that all penalties shall be proportioned to nature of offense.

In State v. Gamble, 155 S.E. 2d 916, 249 S.C. 605, cert. den. 88 S.Ct. 862, 390 U.S. 927, 19 L. Ed. 2d 988 the Court held that although provisions of the Amendment prohibiting cruel and unusual punishments are primarily intended to proscribe inhuman or barbarous treatment, conventional punishment may be so grossly disproportionate to the offense committed as to be cruel and unusual in the constitutional sense.

Because the Court of Appeals did not see or hear the witness or testimony, because the record shows that investment advice was given to the employer and not to the ESOP, because the record shows that the ESOP invested its assets only in the stock of the employer corporation and because ERISA does not prohibit an employer from acting in accordance with its interests, it is

respectfully suggested that the punishment is so grossly disproportionate to the offense, if indeed any occurred, although the evidence does not demonstrate the presence of any offense, as to be cruel and unusual and to frustrate the intent of the framers of the Constitution.

To arrive at its decision, the Court of Appeals reached conclusions which were in direct conflict with the evidence contained in the record.

The Court of Appeals states, on page 24 of its decision, "...Henss's trial testimony displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries. For example, Henss stated repeatedly his view that ESOP fiduciaries are exempt from ERISA's 'prudent man' rule when investing plan assets in an employer's stock or property." In the context in which the testimony was given, appellant was attempting to explain that an ESOP is designed to invest its assets primarily in qualifying employer securities. Therefore, diversification is not required as the "prudent man rule" would dictate for other types of retirement plans. In

arriving at its conclusion, the Court of Appeals did not afford Henss notice and opportunity to be heard.

The Court of Appeals' use of the word "repeatedly" is ill-advised. The same question was asked more than once and the same answer given each time. (Tr. PP. 1067-1076). When the answer given to a question is correct it would ill-behoove the witness to give a different answer each time the question is asked. Again, the Court of Appeals apparently overlooked the context. It was the question, not the answer, to which the word "repeatedly" must be applied. The fact that the Secretary found it necessary to ask the same question several times, has no bearing upon the credibility of the witness, rather it only reflects upon the comprehension on the part of the questioner relating to the subject matter.

The issue to be decided is whether such testimony, in the context in which given, "displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries."

Appellant did not indicate that he believed that ESOP fiduciaries do not have the

"responsibility to act prudently on behalf of the plan's beneficiaries." He testified that an ESOP is exempt from the "prudent man rule" as regards any requirement for diversification of investments which that rule might dictate. The Court of Appeals states, on page 17 of its opinion, regarding Oden, Henss and Thielking, that "Henss was no doubt the dominant partner." On that same page the Court of Appeals states, "the District Court found that the professional accounting services were properly provided." On page 17 of its opinion, the Circuit Court states, "The ESOP was properly structured, the ESOP's books and records were properly maintained, and, most significantly, the accountants' valuations of FMC stock were found to be fair and reasonable." Appellant formed the ESOP, set up the ESOP's books and records and did most of the valuation work. In view of that, it is respectfully submitted that appellant did not fail "to act prudently on behalf of the plan's beneficiaries." Based upon the facts, it is respectfully suggested the remedy as devised by the court is excessive.

Appellant was attempting to recite from memory the provisions of the statute and the Committee Reports in the context of a question regarding the advisability of investing ESOP funds in FMC stock. (Tr. 1070, 1071, 1072, 1076, 1083) (29 U.S.C. 1104(a)(2))

In In re Echeles, C.A. Ill. 1970, 430 F.2d 347 the court held that essential requirements of any disbarment proceeding are notice and opportunity to be heard. Both of those elements are absent in the instant case. While the instant case does not involve disbarment, the sanctions imposed by the Court of Appeals are of a very similar nature.

In Lacomastic Corporation v. Parker, 54 F. Supp. 138 (1944) the court held that in judicial as distinguished from administrative proceedings, there is an inherent right on the part of litigants to have a decision rendered by the judge who presides at the trial and hears the testimony. The judge who heard the testimony in the instant case rendered his decision yet the Circuit Court, which heard no testimony, ruled that the presiding judge abused his discretion.

The penalty imposed by the Court of Appeals in this case is so onerous that certain standards should apply although not commonly involved in civil cases. The burden of proof should be on respondent and the "insensitivity" attributed to petitioner should have to be proved beyond any reasonable doubt. In this case, however, respondent did not prove even with tainted evidence, not to mention a preponderance of the evidence, that appellant was "insensitive" in this context. In addition, there is indisputably reasonable doubt as regards this charge.

Had appellant committed murder, rape or robbery he would have some hope of someday seeing an end to the punishment invoked for those acts. Not so with the permanent injunction imposed by the Court of Appeals. Because of the permanency of that injunction he will be deprived of pursuing his full means of livelihood so long as he shall live. When that type of punishment is imposed for an act which the Court of Appeals seems to be arguing with itself as to whether or not was illegal, it is respectfully suggested that the true sense of justice is conspicuous by

its absence and the punishment must surely be cruel and unusual.

In determining that Henss and John L. Henss, C.P.A., P.C. were fiduciaries, the Court of Appeals relied upon the theory that "they structured deals, and provided investment advice to such an extent that they exercised effective control over the ESOP's assets." Yet that court wrote, "ESOP fiduciaries should not be subject to breach-of-duty liability for investing plan assets in the manner and for the multiple purpose that Congress intended." That court also wrote, "We held that 'ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets'." The contradictions contained therein seem to demonstrate and indicate uncertainties on the part of the Court of Appeals. The only investments made by the ESOP were in qualifying employer securities which is the expressed intent of Congress. Therefore, based upon the Court of Appeals' opinion, these fiduciaries "should not be subject to breach-of-duty liability" for

merely complying with Congressional mandate.

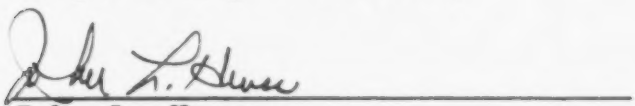
Because the Court of Appeals did not see or hear the witness or testimony, because the record shows that investment advice was given to the employer and not to the ESOP, because the record shows that the ESOP invested its assets only in the stock of the employer corporation and because ERISA does not prohibit an employer from acting in accordance with its interests, it is respectfully suggested that the punishment is so grossly disproportionate to the offense as to be cruel and unusual.

We must further suggest that an attempt by an attorney for respondent to coerce and intimidate counsel for appellant through threat of reprisal is a vast departure from the standard of fair play of Galvan v. Press, supra. It is further suggested that irrelevant evidence furnished by an attorney who could so furnish only by violating his professional ethics, is so tainted as to render it worthless. In the least damaging light, it is a serious departure from the realm of fair play.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Dated Nov. 13, 1992

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was served on the following persons on November 13 1992 by depositing a copy of said Petition in the United States mail, postage prepaid, on November 13 1992:

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APPENDIX

Findings of Fact, Conclusions of Law, Rulings and Decisions,
United States District Court for the Southern District of Iowa

Supplemental Findings of Fact and Conclusions of Law, and Final Judgment and Decree,
United States District Court for the Southern District of Iowa

Appeals from the United States District Court for the Southern District of Iowa,
United States Court of Appeals for the Eighth Circuit

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ELIZABETH DOLE, Secretary of Labor of the United States Department of Labor, Plaintiff, v.	)	CIVIL NO. 88-103-A
HARVEY N. FEILEN, ARMIN P. W. THIELKING, PAUL W. THIELKING, JOHN L. HENSS, STEPHEN K. THIELKING, R & N GARAGE COMPANY, LAKEWOOD MARINE CO., PAUL W. THIELKING, O.D., P.C., JOHN L. HENSS, C.P.A., P.C., STEPHEN K. THIELKING, C.P.A., P.C., ODEN, HENSS & THIELKING and CAPITAL RESOURCES CORP., Defendants.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, RULINGS AND DECISIONS

This case was tried to the court from October 30, 1989, through November 16, 1989. The parties then simultaneously submitted proposed findings and judgments. On December 22, 1989, the court heard oral argument by telephone conference call. The matter was then deemed submitted for final ruling on the merits. The court now rules as follows on unresolved motions and issues the following findings of fact, conclusions of law, and decisions. A final judgment and decree will be entered after the

hearing scheduled to begin at 10:30 a.m. on July 16, 1990.[1]

Rulings on Pending Motions

1. Plaintiff moves the court to enforce the order of August 21, 1989, concerning the deposition of the expert witness Gregory M. Sieh whom defendants disclosed later and thereafter called as a trial witness. The court stated that "[d]efendants shall pay all reasonable costs--including transportation costs--associated with the deposition." Plaintiff has since filed

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[1]The court apologizes for the extended delay between submission of this case and issuance of these rulings and decisions. That delay is unprecedented for this judge. It is not excused but explained by the large volume of civil and criminal cases on this court's calendars and the volume of complex documentary and testimonial evidence the parties proffered. The decision-making task was burdened as well by the acrimonious written and oral exchanges of counsel for the parties throughout the pre-trial and trial phases of this case. The parties' filings did not end with submission in late December. In February, March, and as late as June 19, 1990, counsel continued to exchange and present to the court copies of letters, an affidavit, and an amended proposed order pertaining to the plaintiff's motions for sanctions.

and then modified its billing and proposed order concerning costs associated with the September 27, 1989 deposition of Sieh. The court concludes that plaintiff has attempted to assess fees and costs that are greater than in fairness defendants should be required to pay. The fair and reasonable amount defendants shall pay plaintiff by July 31, 1990, is the sum of $885.70.

2. Plaintiff moves for sanctions against defendants for the expenses and costs associated with a delayed deposition of James O'Brien, the cancelled deposition of Frances Vitagliano, and the aborted pretrial conference that had been scheduled for August 1, 1989. On review of the parties' vigorous, indeed exaggerated charges and countercharges concerning the alleged inappropriate behavior of counsel, and using a reasonable degree of judicial tolerance for fair advocacy, even combativeness permitted by our adversarial system of justice, the court concludes attorney Lombardi should be required to pay some costs to plaintiff. Lombardi certainly should have known that his scheduling conflict

would delay the O'Brien deposition; he had the responsibility to inform plaintiff's counsel of his conflict well in advance of the time the deposition was to begin. Lombardi did not act reasonably in arriving several hours late at the deposition and failing to give reasonable notice of his expected absence. The deposition was delayed by three hours and fifteen minutes. The court orders that Steven Lombardi, individually, shall by July 31, 1990, reimburse plaintiff the sum of $747.80 for costs its counsel and witness reasonably incurred by reason of the delay in commencing the deposition.

The other requests for sanctions are considered and denied. Cancellation of the Vitagliano deposition was a reasonable strategic decision of counsel that caused no serious disruption in the preparation for trial of any party or attorney. Finally, the court does not impose sanctions for the decision of defendants' counsel to abort the pretrial conference that had been scheduled for August 1, 1989. Defendants' counsel did not use good judgment in failing to inform plaintiff's counsel of their decision not

to attend, but such oversights, clearly foolish, are excusable.

3. Plaintiff moves this court to allow it to amend its complaint to conform to the evidence. Amendments which change only the legal theory and raise issues tried by consent will be allowed. Fed. R. Civ. P. 15(b); see United States v. Hougham, 364 U.S. 310, 317 (1960); Carlen v. Ray E. Friedman & Co. Commodities 688 F.2d 1193, 1197 n.3 (8th 1982). The court grants plaintiff permission to amend its complaint, but the amendments are not allowed to relate back to the initial filing of the complaint. Defendants asserted their limitations defenses well before plaintiff attempted to amend its complaint. The amendments are allowed, but in the interest of fairness and justice the claims are deemed filed as of the date that defendants filed their motion to conform their pleadings--December 8, 1989.

4. Plaintiff moves the court to permit plaintiff to include in evidence the written decision of the Marshall County District Court dated March 24, 1989, referred to in part during examination of witnesses. The motion is denied.

The decision itself is hearsay. Plaintiff has not given satisfactory explanation why the decision was not offered in evidence before all parties rested. The written decision itself is excluded from evidence for those reasons.

The Limitations Defenses

Defendants have presented multiple limitations defenses, both by summary judgment filed shortly before trial and in their trial briefs. The six-year statute of limitations found in 29 United States Code section 1113 bars ERISA actions commenced six years after the act or omission constituting a breach, or three years after the earliest date on which a claimant has actual knowledge or should have obtained knowledge of a breach.

Plaintiff dismissed on the record its complaint against defendants John L. Henss (Henss) and Stephen K. Thielking (SKT) arising from the so-called Nelson option. Those claims are barred by limitations; plaintiff's Nelson option claims against Henss and SKT are dismissed.

Defendants Capital Resources Corp. (CRC),

Paul W. Thielking, O.D., P.C., and Lakewood Marine Co. were not signatories to the tolling agreement between plaintiff and other defendants. The six-year limitation bars all claims by the plaintiff against the defendants CRC, Paul W. Thielking, O.D., P.C., and Lakewood Marine Co., who did not sign the tolling agreement. This action is dismissed as to those three defendants.

The other claims against other defendants are not barred by limitations. The tolling agreements executed by those defendants were intended to and did extend until February 29, 1988, the time within which plaintiff could commence the claims it has brought against them. This action was commenced against all defendants on February 23, 1988, which was within the time permitted by the tolling agreements.

Defendants argue that the tolling agreements contained a non-waiver provision that left open "any defense based upon the statute of limitations that may have arisen prior to December 11, 1986." The court concludes that no claim had been barred before those dates. The tolling provision should be construed in favor of

allowing the plaintiff to proceed with the lawsuit claims. It clearly was intended to preserve the plaintiff's claims while the parties made efforts to negotiate out-of-court settlements. Settlements are favored in the law. Defendants did not even assert their limitations defenses until the very eve of trial when they filed their motions or partial summary judgment.

Defendants have not satisfied their burden to establish their limitations defenses in this case except to the extent plaintiff's Nelson option claims against Henss and SKT, are barred, and all claims against CRC, Paul W. Thielking, O.D., P.C. and Lakewood Marine Co. are barred.

The Merits

In response to the final pretrial order of October 12, 1989, the parties filed a lengthy and detailed stipulation of facts; the court adopts those facts by this reference. The court now supplements the stipulated facts with findings of fact based on credible evidence presented by the parties and inferences from that evidence. The facts are stated against the backdrop of the following issues.

The Issues

An Employee Stock Ownership Plan (ESOP) [or Employee Stock Option Trust (ESOT)] is a plan and funding mechanism, qualified under provisions of the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA) designed to provide retirement benefits for employees while creating a mechanism for employees to invest in the company employing them. Under proper circumstances, employees may invest in employer stock.

See D. Shine and D. Mason, ESOP: The American Workers Leveraged Buyout, 95 Case & Comment 24-26 (1990). To protect employees whose funds are invested in an ESOP, trustees responsible for administering the fund and directors of corporations with an ESOP who select the trustees are charged with strict fiduciary duties. Self-dealing to the detriment of an ESOP is prohibited.

This case concerns Feilen Meat Company (FMC), a Des Moines beef processing plant, that established an ESOP on May 1, 1974, to provide retirement benefits to its employees. The ESOP

plan replaced a pre-existing profit sharing plan. The only assets of the ESOP have been shares of FMC stock.

When Feilen's founder and owner Harvey H. Feilen sold FMC to several of the defendants in a series of stock transactions after 1974, the defendants took control of the company, with the ESOP as a captive minority holder of stock. By 1985 the company had encountered financial difficulties and closed, diminishing and essentially destroying the value of FMC stock, the ESOP's only asset. Plaintiff's central theme in this case was forcefully stated during closing argument:

> Basically, the underlying situation as the plaintiff sees it is that a group of individuals, the defendants, got control of FMC, used that control to, in effect, drain the company dry for their own benefits. In doing so, they acted solely in their own interests, ignoring the interests of the only stockholders of that company who were not a part of their group, and that the ESOP.

Two fundamental issues are presented:

> (1) Did defendants violate ERISA fiduciary requirements in structuring FMC stock transactions in such a way that the prices paid for the stock did not represent the fair market value, damaging the ESOP? (2) Did defendants commit

other abuses, such as self-dealing and failure to act as reasonably prudent fiduciaries, in connection with other transactions adversely affecting the ESOP?

The court concludes the answer is no to the first question and yes to the second.

Findings of Fact

1. FMC was founded by Harvey H. Feilen, the father of Nick Feilen (Feilen), sometime before 1968. (Nick Feilen was a defendant until shortly before trial when the plaintiff reached a settlement with him and dismissed him from the lawsuit.) FMC was primarily a beef boning and breaking operation that received beef carcasses, removed the bones, and produced primal cuts and ground beef. The company had a unionized workforce with stable labor relations and minimal workforce turnover. From its inception in the 1960s until shortly before it closed in early 1985, FMC was modestly profitable and debt free.

2. Harvey H. Feilen retired in 1977 and sold FMC to Feilen, Armin P. W. Thielking (APWT), and Paul W. Thielking (PWT). Feilen worked at FMC on a fulltime basis from 1964 on. After he purchased FMC stock in 1977, Feilen operated FMC

as its president and was primarily responsible for its daily operations.

3. Prior to purchasing their stock in FMC, neither APWT nor PWT had any experience in the meat industry or worked at FMC. After the purchase, they had no involvement with the daily operations of FMC.

4. Henss had worked as an accountant for FMC since at least 1975 and understood its financial condition and need for cash flow. He proposed the Thielkings as potential buyers and thereafter was the person who was primarily responsible for structuring the stock transactions involving transfer of FMC capital stock. Henss performed his services for FMC as a partner in the accounting firm of Oden, Henss & Thielking (OH&T). Steven K. Thielking (SKT) was an accountant with OH&T who assisted Henss in structuring the FMC stock transactions.

5. To finance their purchase of FMC stock, PWT and APWT borrowed money from Brenton Bank. They then directed FMC to make payment on that debt out of FMC cash flow. Defendants' obligation to FMC was recorded as an account

receivable, representing an asset on FMC's books. Ultimately, the PWT and APWT debts to FMC were removed from FMC's books as a result of the dividend declaration dated October 2, 1981. This arrangement allowed the defendants to buy FMC with its own income and restricted FMC's cash flow from FMC's operations because of the need to service debts incurred by defendants' ventures.

6. From its inception in the 1960s until shortly before it closed in early 1985, FMC operated quite successfully and was relatively free of debt. But after defendants acquired FMC and made it a subsidiary of their parent company CRC, FMC's financial condition deteriorated. CRC used FMC's cash flow to finance business ventures of CRC, including corporate acquisitions and the attempted operation of several businesses, none of which was profitable. Largely as a result of the debt incurred by CRC that defendants required FMC to guarantee, FMC encountered increasingly serious cash flow problems.

7. In February 1985, an FMC check for about $30,000 given to Cimpl Packing, one of FMC's suppliers, was returned for insufficient funds.

Prompt payment of suppliers is critical in the meat industry. FMC closed when Cimpl Packing and other suppliers refused to extend credit and sell products to FMC.

8. Defendants have established from the testimony of Henss and Sieh that the transactions in which the ESOP purchased or sold shares of FMC stock and the Nelson option transaction were for adequate consideration. Adequate consideration is the price a willing buyer would pay a willing seller, both having reasonable knowledge of the pertinent facts. Sommers Drug Stores v. Corrigan Enter., Inc., 793 F.2d 1456, 1461 (5th Cir. 1986). Valuation of the stock of FMC, a closely held company, would be difficult at best, because there were no truly comparable sales of stock nor a readily available market for the stock. Accountants and other personnel at OH&T, under the guidance of Henss, determined the stock value in each transaction by using a capitalized earnings approach which was an evaluation approach commonly used by accountants. The calculations were in writing and retained in the records of OH&T and FMC.

9. The court finds credible the testimony of the expert witness Sieh, an accountant who found no serious flaws in the accounting practices and valuation techniques of Henss and other personnel of OH&T. Sieh essentially approved the valuations and calculations performed by accountants in OH&T using their capitalized earnings approach to value. The valuation technique used by OH&T, no longer an approved evaluation method, was at the time regularly used by accountants valuing stock of closely held corporations like FMC, and it was used consistently by OH&T with respect to all the FMC stock transactions that Henss and SKT structured.

10. The court finds the testimony of plaintiff's expert O'Brien was flawed in several respects and lacked credibility. Sieh correctly pointed out that O'Brien inappropriately used hindsight in applying later year tax rates in certain of his calculations. The meat processing companies he used as comparable to derive capitalization rates were not fairly comparable to FMC. Moreover, the stock valuations performed by OH&T and by O'Brien would all be subject to considerable margins of error, with market value

estimates varying depending on the method used. The testimony of Henss and defendants' expert Sieh persuasively established that the OH&T valuation methods were commonly in use in the years here in question. It is also noteworthy that when one applies either the O'Brien valuations or the OH&T valuations to all of the stock transactions affecting FMC, the FMC ESOP would have approximately the same percentage ownership in FMC following the last transaction. This is because any errors on the valuation of purchases or failures to purchase stock would largely cancel each other out.

Conclusion of Law

I. This court has jurisdiction of this action pursuant to 29 United States Code section 1132(e)(1); and the plaintiff, as Secretary of Labor, has authority to bring this action pursuant to 29 United States Code section 1132(e)(1).

II. The FMC ESOP is an employee pension benefit plan within the meaning of 29 United States Code section 1002(2)(A); FMC, employer of employees covered by the ESOP, is a party in interest within the meaning of 29 United States Code section

1002(14)(C).

III. Fiduciaries of the ESOP within the meaning of 29 United States Code section 1002(21)(A)(i) include the following:

(a) Feilen was a trustee exercising authority over ESOP assets and also an FMC director.

(b) APWT was a fiduciary because he was a trustee and, as an FMC director, had the power to appoint and remove trustees.

(c) PWT was a fiduciary because he was an FMC director and he had the power to appoint and remove trustees.

(d) Henss was a fiduciary because he exercised authority and control in managing ESOP assets, as the principal investment advisor to the other defendants.

(e) SKT, a partner of Henss in OH&T, was a fiduciary because he exercised authority and control in managing ESOP assets and giving investment advice to the trustees of the ESOP.

(f) CRC was a party in interest with respect to the ESOP because it owned at least ten percent of the FMC common stock.

See Leight v. Engle, 727 F.2d 113, 134 (7th Cir. 1984): Donovan v. Mercer, 747 F.2d 304, 309 (5th Cir. 1984).

IV. For purposes of determining who were parties responsible for performing fiduciary duties owed the ESOP, the court deems the following corporate entities to be inseparable from and alter egos of the following persons, who owned and controlled the corporate entities:

(a) APWT is not separate from Lakewood Marine, Ltd.

(b) PWT is not separate from Paul W. Thielking, O.D., P.C.

(c) Feilen is not separate from R & N Garage Co.

(d) John L. Henss is not separate from John L. Henss, C.P.A., P.C., and the partnership of OH&T.

(e) SKT is not separate from Steven K. Thielking, C.P.A., P.C.

See Blatt v. Marshall & Lassman, 812 F.2d 810 (2nd Cir. 1987);

Lakota Girl Scout Council Inc. v. Havey Fund-Raising Management Inc. 519 F.2d 634, 638 (8th Cir. 1975); Murray v. Conrad, 346 NW 2nd 814, 820 (Iowa 1984).

V. Defendants satisfied their burden to prove that the valuations placed on the capital stock of FMC by Henss and other persons at OH&T were reasonable valuations of the fair market value of the stock on the dates in question--January 1, 1981; September 1, 1981; October 2, 1981; January 2, 1982; January 4, 1982. The valuation techniques were consistently used throughout the series of FMC stock transactions. Plaintiff has not demonstrated that the FMC stock suffered an adverse effect from the valuations OH&T placed on the stock. Plaintiff correctly states that each of those stock appraisals should have been performed by a qualified, informed person having no interest in FMC or related entities. But defendants' evidence established that each of the transactions was for adequate consideration,

thereby satisfying the requirements of 29 United States Code section 1108(e).

VI. The defendant fiduciaries breached their duties of undivided loyalty and prudence under ERISA sections 404(a)(1)(A) and (B), when they engaged in transactions affecting the ESOP that involved self-dealing and conflicts of interest.

(a) They directed and allowed FMC to guarantee repayment of a $3,200,000 loan to CRC, without requiring that FMC obtain adequate consideration and business advantage.

(b) They allowed FMC to make payments in excess of $230,000 on the CRC obligations to Central Federal without requiring that FMC obtain adequate consideration and business advantage.

(c) They engaged in unwise business transactions that were intended primarily to inure to the benefit of the fiduciaries themselves, their families, and companies in which they had a financial stake.

(d) Each fiduciary failed in the duty

to prevent the other fiduciaries from engaging in self-dealing and in violating the duties of loyalty and prudence all fiduciaries owed to the FMC ESOP.

VII. Plaintiff has proved that these breaches of defendants' fiduciary duties were harmful to FMC and the ESOP, but plaintiff has not proved the extent to which FMC was damaged. The ESOP value was greatly diminished by the inability of FMC to remain in business when it was no longer able to meet its cash requirements, caused in part by inappropriate obligations imposed on FMC by the defendants; but the court has been unable to determine with reasonable certainty the actual monetary loss and damages caused by the fiduciaries' breaches of duty owed FMC.

Remedies

Section 409(a) of ERISA, 29 United States Code section 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through

> use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of all such fiduciary...

This court has not been provided sufficient concrete suggestions from either party on which it can determine the most appropriate relief due the plan participants and beneficiaries under the present state of this record. Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983); Eaves v. Penn, 587 F.2d 453, 462-63 (10th Cir. 1978).

The court concludes that injunctive relief is appropriate; at a minimum, the defendants are permanently enjoined from serving directly or indirectly as fiduciaries of any ESOP or ESOT, or any other employee benefit plan covered by ERISA. Defendants and their agents, officers, directors, successors, employees, and any persons in active participation with them, are permanently enjoined from engaging in any acts that would violate fiduciary duties imposed by ERISA.

The court invites the parties and counsel to submit an additional brief and proposed judgment setting forth what additional remedy or remedies

are most appropriate in light of this court's above rulings, findings of fact, and conclusions of law. The parties may file such proposals by not later than July 9, 1990, and any party may reply to such proposals by not later than July 13, 1990. The court will hold a further hearing in this case on Monday, July 16, 1990, at 10:30 a.m. at the United States Courthouse to hear final arguments and then render a final judgment and decree in this case.

IT IS SO ORDERED.

Dated this 29 day of June, 1990.

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ELIZABETH DOLE, Secretary of Labor of the United States Department of Labor, Plaintiff, v.	)	CIVIL NO. 88-103-A
HARVEY N. FEILEN, ARMIN P. W. THIELKING, PAUL W. THIELKING, JOHN L. HENSS, STEPHEN K. THIELKING, R & N GARAGE COMPANY, LAKEWOOD MARINE CO., PAUL W. THIELKING, O.D., P.C., JOHN L. HENSS, C.P.A., P.C., STEPHEN K. THIELKING, C.P.A., P.C., ODEN, HENSS & THIELKING and CAPITAL RESOURCES CORP., Defendants.	)	SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSION OF LAW, AND FINAL JUDGMENT AND DECREE

On June 29, 1990, this court entered a proposed judgment finding the defendants had breached their fiduciary duty under ERISA for engaging in transactions affecting the Feilen Meat Company Employee Stock Ownership Plan (the ESOP) that involved the defendants in self-dealing and conflicts of interest. The court was unable, however, to determine from the evidence the extent to which FMC was damaged by defendants' conduct. Neither could the court determine from the evidence that defendants' conduct was a proximate cause of the losses that plaintiff contended the ESOP had sustained. The

court allowed the parties, however, to present further briefs on that issue and held a further hearing on August 28, 1990.

In their memorandum on proposed judgment and remedies, and in argument during the hearing, plaintiff's counsel presented a theory for determination and calculation of damages that was strikingly different than that presented during the trial and in post-trial briefs. During trial plaintiff's counsel had focused almost exclusively on the opinion testimony of the expert witness James O'Brien, contending that the losses sustained by the ESOP were caused by its not having an opportunity to exercise an option to buy FMC stock, and its paying too much for FMC stock it purchased or receiving too little for stock it sold. This court found the O'Brien testimony concerning valuation of FMC stock flawed and lacking in credibility. Now the government has attempted to mend its hold by contending that the plaintiff is entitled to recover from the defendants "the total value of the ESOP investment in FMC stock, including interest" on the theory that the ESOP "lost this

entire amount when, due to defendants' acts, FMC closed in February 1985, and the ESOP interest became worthless." Plaintiff's July 23, 1990 memorandum and proposed judgment, p.5.

The court now enters the following supplemental findings of fact and conclusion of law, and enters a final decree as follows:

Supplemental Findings of Fact

11. The serious cash flow problems that caused FMC to shut down and go out of business in 1985 were caused by many economic factors, including the state of the local and national economy in the early 1980's, competition from other meat processors, and the decision of FMC's founder Harvey H. Feilen in the mid-1970's to diversify his investments.

12. The business decision to diversify made sense at the time, but it led to a weakening of the FMC financial structure and eventually so restricted the cash flow as to force a closing of the meat processing operations.

13. The evidence does not support plaintiff's contention that defendants' breaches of fiduciary duty, consisting of self-dealing and

engaging in transactions that constituted conflicts of interest, caused FMC to go out of business or caused any measurable loss in value of FMC stock.

Supplemental Conclusion of Law

VIII. Plaintiff has not proved that defendants' breaches of fiduciary duties proximately caused measurable monetary loss to FMC or the ESOP. Regardless whether plaintiff had the burden to prove losses to the ESOP, or defendants had the burden to disprove losses to the ESOP, the court finds that the evidence does not support any judgment for damages against the defendants by reason of the reduction in value of the stock of FMC.

FINAL JUDGMENT AND DECREE

1. Plaintiff is entitled to judgment in its favor and against all defendants permanently enjoining them from serving directly or indirectly as fiduciaries of any ESOP or ESOT, or any other employee benefit plan covered by ERISA. Defendants and their agents, officers, directors, successors, employees, and any persons in active participation with them, are permanently enjoined

from engaging in any acts that would violate fiduciary duties imposed by ERISA.

Plaintiff is entitled to its costs, and all defendants are jointly and severally liable for the costs of this action.

The court denies all other prayers for relief contained in the plaintiff's complaint.

The clerk of court shall enter judgment in accordance herewith.

IT IS SO ORDERED.

Dated this 2nd day of November, 1990.

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1086

Lynn Martin, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellant,

v.

Harvey N. Feilen; Armin P. W. Thielking; Paul W. Thielking; Stephen K. Thielking; John L. Henss; R & N Garage Company; Lakewood Marine Ltd.; Paul W. Thielking, O.D., P.C.; John L. Henss, C.P.A.; Oden, Henss & Thielking; and Capital Resources Corporation,
Defendants-Appellees.

No. 91-1295

Lynn Martin, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellee,

v.

Harvey N. Feilen; Armin P. W. Thielking,
Defendants,

* Appeals from the United States District Court for the Southern District of Iowa.

Paul W. Thielking; Stephen K. Thielking; John L. Henss, Defendants-Appellants,

R & N Garage Company; Lakewood Marine Co., Defendants,

Paul W. Thielking, O.D., P.C.; Stephen K. Thielking, C.P.A., P.C.; John L. Henss, C.P.A.; Oden, Henss & Thielking; Capital Resources Corporation, Defendants-Appellants.

Submitted: October 17, 1991

Filed: June 3, 1992

Before WOLLMAN, Circuit Judge, ROSS, Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

In this case the Secretary of Labor urges us to conclude that controlling stockholders and directors of Feilen Meat Company ("FMC"), and the company's accountants, breached their fiduciary duties under ERISA[1] when they engaged in complex financial transactions that destroyed the

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[1]The Employee Retirement Income Security Act, 29 U.S.C. section 1000-1461.

company, thereby wiping out the employees' stock ownership plan. The Secretary appeals the district court's judgment that defendants committed many breaches of fiduciary duty but did not cause money damage to the plan. We construe defendants' fiduciary duties more narrowly than did the district court. However, we also conclude that the Secretary may recover money damages on behalf of the plan for the breaches of duty that did occur. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

FMC conducted beef boning and breaking operations in Des Moines, Iowa. Before the events in question, FMC employed approximately fifty unionized workers, posted modest annual profits, and carried little if any debt. FMC established an employee profit-sharing plan in the late 1960s. In May 1974, with the employees' approval, FMC created the Feilen Meat Co. Employee Stock Ownership Plan (the "ESOP") which soon took over the assets of the profit-sharing plan. By 1981, the ESOP owned twenty-eight

percent of FMC's stock. That stock was the ESOP's only asset.

Harvey Feilen founded FMC and was its primary stockholder and the ESOP's sole trustee until the fall of 1977, when he sold his controlling interest to his son Nick and defendants A.P.W. Thielking and Dr. Paul W. Thielking. Neither A.P.W., a retired insurance broker, nor Paul, an optometrist, had any experience in the meat industry, and neither participated in the daily operations of FMC as directors. This leveraged buy-out transaction was proposed and structured by FMC's accountant, defendant John Henss, who had also proposed and structured the ESOP. A.P.W. and Paul are the father and uncle of defendant Stephen Thielking, Henss's partner at defendant Oden, Henss & Thielking ("OHT"), the accounting firm that served FMC throughout the period in question.[2]

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[2]The additional defendants are personal corporations used by the individual defendants to conduct their business affairs. The district court held that John L. Henss, C.P.A., P.C.; Stephen K. Thielking, C.P.A., P.C.; Paul W. Thielking, O.D., P.C.; and Lakewood Marine Ltd. (for A.P.W.) were the alter egos of their

Nick Feilen became the ESOP's sole trustee in November 1977. A.P.W. became a co-trustee in May 1982. Nick settled separately with the Secretary and was the government's lead trial witness. Nick testified that he had no real understanding of an ESOP trustee's duties and relied heavily on Henss's advice, and that the OHT accountants made all valuation decisions relating to the ESOP's transactions in FMC's stock.

Beginning with the leveraged buy-out in 1977, and ending with FMC's demise in February 1985, the corporate insiders engaged in a complex series of transactions involving FMC, its stockholders, related entities, and in some cases the ESOP. The transactions challenged by

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respective owners. The record supports the district court's conclusion to pierce these corporate veils under Iowa law. See Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634, 638 & n.4 (8th Cir. 1975); C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc., 412 N.W. 2d 593, 597-98 (Iowa 1987); Murray v. Conrad, 346 N.W. 2nd 814, 820 (Iowa 1984). See also Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R., 417 U.S. 703, 713 (1974)

the Secretary were done at the recommendation of Henss and Stephen Thielking, who had personal financial interests in many of the transactions in addition to their role as FMC's outside accountants. A.P.W. and Paul Thielking were FMC directors who also stood to gain personally from many of the transactions, but the record does not otherwise reflect their personal involvement in managing or investing the ESOP's assets.

The various self-dealing transactions were intended to provide diversification and tax benefits to FMC and its stockholders, including the ESOP. Instead they brought ruin, although defendants insist that FMC failed because of adverse conditions in the meat industry. When FMC closed its doors, its employees lost both their jobs and the entire value of their retirement accounts in the ESOP.

(court of equity may disregard the corporate form "in the interests of justice where it is used to defeat an overriding public policy"). However, we do not agree with the district court's finding that OHT was the alter ego of Henss, see p. 17, infra.

The Secretary brought this action in February 1988, charging that defendants breached their fiduciary duties under sections 404, 405 and 406 of ERISA, 29 U.S.C. sections 1104-06.[3] After a two-week trial, the district court held that all of the defendants were ERISA fiduciaries who had breached their fiduciary duties of undivided loyalty and prudence with respect to many of the transactions at issue. The court rejected the Secretary's claim that defendants had engaged in prohibited transactions in violation of section 1106 because "the transactions in which the ESOP purchased or sold shares of FMC stock...were for adequate

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[3]The Secretary is specifically empowered to bring such an action, see 29 U.S.C. section 1132(a)(2).

consideration"; the Secretary has not appealed that ruling. The district court declined to award damages because the Secretary failed to prove that the breaches of fiduciary duty proximately caused measurable monetary loss to the ESOP. The court permanently enjoined defendants "from serving directly or indirectly as fiduciaries of any ESOP" but did not enjoin the accountant defendants from acting as service providers to ERISA plans.

Both sides timely appealed. The Secretary argues (i) that A.P.W. and Paul Thielking breached their ERISA fiduciary duties in misappropriating a stock option belonging to FMC, an issue the district court did not address; and (ii) that the district court erred in failing to award money damages for losses to the ESOP, and in declining to enjoin Henss, Stephen Thielking, and OHT from acting as service providers to any ERISA plan. In their cross appeal, appellees argue that they were not ERISA fiduciaries, that ERISA does not apply to FMC business transactions, and that no fiduciary duties were breached.

II. An Overview

Borrowing from trust law, ERISA imposes high standards of fiduciary duty upon those responsible for administering an ERISA plan and investing and disposing of its assets. The ERISA fiduciary is subject to a strict standard of care, 29 U.S.C. section 1104(a)(1);[4] is liable for known breaches of co-fiduciaries, section 1105; and may not engage in prohibited transactions, section 1106.

An ESOP is an ERISA plan which invests primarily in "qualifying employer securities," typically stock of the employer creating the plan. Section 1107(d)(6)(A). Congress expressly intended that the ESOP would be both an employee retirement benefit plan and a "technique of corporate finance" that would encourage employee ownership. See 129 Cong. Rec. S16629, S16636

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[4]More specifically, this section provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and...

(Daily ed. Nov. 7, 1983) (statement of Sen. Long). The concept has been roundly criticized, particularly because, as this case graphically illustrates, an ESOP places employee retirement assets at much greater risk than does the typical diversified ERISA plan. See generally Note, The False Promise of Worker Capitalism: Congress and the Leveraged Employee Stock Ownership Plan, 95 Yale L.J. 148, 154 (1985). But that is a question for Congress.

To promote and subsidize use of ESOPs, Congress included specific ESOP provisions

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> (B) with the care, skill, prudence, and diligence under the circumstances that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims..."

in both ERISA and the Internal Revenue Code.[5] In 1979, in issuing proposed regulations, the Secretary stated that the statutory exemptions for ESOPs in ERISA

> do[] not relieve a fiduciary...from the general fiduciary responsibility provisions of [Sec. 1104] which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interests of plan participants and beneficiaries and in a prudent fashion...nor does it affect the requirement...that a plan must be operated for the exclusive benefit of employees and their beneficiaries.

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[5]For example, the Tax Code exempts 50% of a qualified lender's interest income from loans made to finance an ESOP's acquisition of employer stock, 26 U.S.C. section 133. The Code also permits an employer to deduct dividends paid on stock held by an ESOP, 26 U.S.C. section 404(k). Not surprisingly, the lure of tax benefits drove some of the transactions at issue in this case.

44 Fed. Reg. No. 168, at p. 50369 (Aug. 28, 1979). In general, that may be true. But the special statutory rules applicable to ESOPs inevitably affect the fiduciary's duties under section 1104. For example, an ESOP is exempted from ERISA's duty to "diversify the investments of the plan," sections 1104(a)(1)(C) & (2). Without this exemption, an ESOP fiduciary would breach a statutory duty to diversify by investing only in the employer's stock. Of great significance to this case, section 1108(e)(3)(A) exempts an ESOP's transactions in the employer's stock from ERISA's strict prohibitions against dealing with a party in interest, and against self-dealing, that is, "deal[ing] with the assets of the plan in his own interest or for his own account." 29 U.S.C. section 1106(b)(1); see also 29 C.F.R. section 2550.408e(a). Indeed, an ESOP may borrow from the employer to buy the employer's stock, section 1108(b)(3), another type of transaction from which ERISA prohibits non-ESOP fiduciaries. See Donovan v. Cunningham, 716 F.2d 1455. 1464-66 & n.24 (5th Cir. 1983).

The Secretary's approach to the ESOP issues

in this case is fundamentally flawed. On the one hand, she ignores the statutory ESOP exemptions, arguing broadly that defendants violated their fiduciary duties simply by engaging in "self dealing" and "conflicts of interest." On the other hand, because the ESOP's only asset was FMC stock, the Secretary argues that defendants' ERISA fiduciary duties were implicated by every FMC corporate transaction that "affected" the value of that stock. From this premise, the Secretary concludes that defendants are personally liable to the ESOP for running the company into the ground.

The district court's decision paints with the Secretary's broad brush. The court held that defendants breached their section 1104 duties "when they engaged in transactions affecting the ESOP that involved self-dealing and conflicts of interest," but awarded no damages because these transactions did not "cause FMC to go out of business or cause any measurable loss in value of FMC stock."

We conclude that this sweeping approach is inconsistent with the specific ESOP exemptions in

the statute. Rather, ERISA requires specific analysis of what FMC transactions sufficiently involved the ESOP to implicate ERISA fiduciary duties. Then, for each covered transaction, there must be specific findings as to who were responsible fiduciaries, whether any fiduciary duties were breached, and if so, what the appropriate remedy should be. Because the district court did not make findings on many of these issues, this case must be remanded for further proceedings. First, however, we will apply our analysis of the statute to the findings and conclusions the district court did make.

III. What Transactions Are Covered

An employer's business decisions will often indirectly affect an ERISA plan or its beneficiaries. Are the persons who make such corporate decisions potentially liable under section 1104 if they also happen to be ERISA fiduciaries? In Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988), we held that "'ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its

assets.'" (quoting Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986)).

In Hickman, the defendants, who were both company executives and plan fiduciaries, refused to allow plaintiffs to remain on the payroll after a plant was sold so that they could become eligible for early retirement benefits. Plaintiffs sued, arguing that defendants had a duty as plan fiduciaries to act in the manner most beneficial to plan participants. We held that defendants were not subject to ERISA's fiduciary duty requirements because their action was a "day-to-day corporate business transaction" made in their capacity as corporate officers, not as plan administrators. 840 F.2d at 566-67.[6]

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[6]See also Adams v. LTV Steel Mining Co., 936 F.2d 368, 370 (8th Cir. 1991), cert. denied, 112 S. Ct. 968 (1992); Berger v. Edgewater Steel Co., 911 F.2d 911, 918-19 (3rd Cir. 1990), cert. denied, 111 S. Ct. 1310 (1991); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985), cert. dismd., 474 U.S. 1113 (1986); United Paperworkers Int'l Union v. Jefferson

Ignoring Hickman, the Secretary argues that ERISA's fiduciary duties apply to "all decisions that will affect the pension plan," citing Schaefer v. Arkansas Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988). However, Schaefer involved a change in benefits that left the plan seriously underfunded, a plan administration decision clearly covered under the Hickman test.

We conclude that Hickman applies with equal force when the ERISA plan is an ESOP. Virtually all of an employer's significant business decisions affect the value of its stock, and therefore the benefits that ESOP plan participants will ultimately receive. However, ERISA's fiduciary duties under section 1104 attach only to transactions that involved investing the ESOP's assets or administering the

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Smurfit Corp., 771 F. Supp. 992, 999 (E.D. Mo. 1991), aff'd, No. 91-3128, 1992 WL 76548 (8th Cir. Apr. 20, 1992); Moehle v. N.L. Ind., Inc., 646 F. Supp. 769, 779 (E.D. Mo. 1986), aff'd, 845 F.2d 1027 (8th Cir. 1988).

plan. Accord, Canale v. Yegen, 782 F. Supp. 963, 967 (D.N.J. 1992). A broader rule would make ESOP fiduciaries virtual guarantors of the financial success of the plan (which is indeed the result the Secretary seeks in this case). We cannot reconcile such broad liability with the congressional intent to encourage the use of ESOPs as a "technique of corporate finance."

The district court did not apply the Hickman standard to the specific transactions at issue, concluding instead that appellees breached their fiduciary duties under section 1104 when they "engaged in unwise business transactions that were intended primarily to inure to the benefit of the fiduciaries themselves." However, the record on appeal permits us to separate transactions subject to ERISA from those that are not under Hickman.

Transactions Subject to ERISA.

* OHT was a partner in Imperial Investments. Imperial owed $1.4 million to Central Federal Savings & Loan on a real estate construction loan payable over twelve years at 15% interest. In August 1981, FMC assumed Imperial's monthly

payments of $21,014 to Central Federal. In exchange, FMC received $1.4 million in real estate contracts payable over twenty years at 13% interest, or $16,400 per month. FMC then transferred the assumed obligation to the ESOP for 81 shares of FMC stock.

The Secretary argues that appellees manipulated the price of FMC stock in this transaction. FMC valued each share sold to the ESOP at $17,360, the full market value. However, one month later, FMC sold shares to Henss and Stephen Thielking at a 20% minority discount ($13,888.89/share). Since this transaction involved the ESOP's purchase of FMC stock, under Hickman responsible fiduciaries are liable for any breach of their ERISA duties.

* On October 1, 1981, FMC sold 36 shares of its stock to Henss and Stephen for $13,888.89 per share, reflecting the 20% minority discount. The next day, FMC declared a dividend of $9,000 per share, immediately yielding Henss and Stephen a substantial portion of their purchase price in cash. The ESOP's dividend was 73 FMC shares, priced at the full market value of $17,360.

FMC's sale of stock to Henss and Stephen did not involve investing the ESOP's assets, but the subsequent FMC dividend did. If the ESOP's purchase price was wrongfully manipulated, then fiduciaries responsible for the manipulation are subject to section 1104 liability.

* On November 1, 1981, all FMC stockholders except the ESOP exchanged their FMC shares for newly issued shares of Capital Resources Corporation (CRC), a corporation controlled by Henss. After this exchange, the ESOP owned 53.9% of FMC's outstanding stock. On January 2, 1982, CRC purchased 105.09 shares from the ESOP by assuming the ESOP's liability to Central Federal for the Imperial debt. CRC paid the ESOP $13,288.87 per share, again reflecting the 20% minority discount even though this purchase gave CRC a majority interest in FMC. Two days later, FMC paid a $2,900 per share dividend, declared prior to the CRC/ESOP transaction, that provided CRC approximately $300,000 in cash on the shares it had just purchased at a discount. Again, fiduciaries responsible for any price or dividned manipulation are subject to section 1104

liability.

* After CRC assumed the Imperial debt, the ESOP continued to make the $21,014 monthly payments to Central Federal until January 1985. The district court found that the ESOP received no consideration for paying some $230,000 of CRC's debt. Responsible fiduciaries are liable for such waste of the ESOP's assets.

The Duty To Challenge Other Transactions.

* On January 1, 1982, FMC held an option to purchase 41.72 of its shares from Richard Nelson for $30,000. FMC's principal stockholders, Nick and the Thielkings, personally exercised the option and purchased shares with a value, at that time, of nearly $1,000,000. The Secretary argues that A.P.W. and Paul breached their ERISA fiduciary duties by misappropriating this corporate opportunity because the ESOP's ownership interest would have increased had FMC purchased the shares at this bargain price. However, FMC's transfer of the Nelson option to its controlling stockholders was a corporate transaction that did not involve investing the ESOP's assets or administering the plan.

Therefore, this transfer and the subsequent exercise of the option were not transactions subject to their ERISA duties under Hickman.

However, the Secretary further argues that Nick and the Thielkings breached corporate law duties to FMC's minority stockholders, including the ESOP, in misappropriating the Nelson option; that the ESOP's fiduciaries had a duty to challenge that breach through a derivative stockholders' action; and therefore the Secretary may sue the ESOP fiduciaries for failing to do so. As the Secretary notes, the Fifth Circuit has recognized that an ESOP may pursue minority stockholder claims. Sommers Drug Stores Co., Employee Profit Sharing Trust v. Corrigan Ent., Inc., 793 F.2d 1456, 1468-69 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987).

The decision not to have the ESOP assert such a claim is one of plan administration. Thus, under Hickman, the Secretary may sue the ERISA fiduciaries for damages under section 1109 for failing to assert the derivative claim. As the court said in Canale v. Yegen, 782 F. Supp. at 968 n.3:

> As plan fiduciaries, defendants may have had an obligation to bring a derivative action if they were aware that the officers and directors of the entities whose stock was held by the ESOP had breached fiduciary duties owed their shareholders; that this would require defendants to bring suit against themselves does not relieve them of their fiduciary duties under ERISA.

To recover under this theory, the Secretary must prove both a breach of the ESOP fiduciaries' duties, and that the derivative suit against the corporate insiders would have prevailed. Since its opinion did not address this issue, on remand the district court must determine whether the Secretary proved such a claim against A.P.W. and Paul Thielking.

After CRC became the controlling stockholder of FMC, defendants caused FMC to engage in a number of transactions seemingly for the sole or primary benefit of CRC:

* On April 2, 1982, CRC borrowed $3.2 million from Brenton Bank, pledging all of FMC's assets as security. The loan proceeds funded other CRC projects or loans to CRC principals. No ESOP stock was pledged, nor were ESOP assets otherwise involved in the projects or loans.

* FMC advanced approximately $930,000 to CRC between November 2, 1982 and January 10, 1985, recording the advances as receivables. An audit revealed no evidence that CRC had repaid or was obligated to repay these advances. Again, none of these advances involved ESOP stock or assets.

* In October 1984, a CRC affiliate purchased real estate from FMC for $266,000 and that same day contracted to sell it to a third party for $598,000. Though that sale fell through, CRC eventually sold the land for $375,000 in August 1986.

These transactions sapped FMC's financial strength and certainly raise doubts about whether defendants fulfilled their corporate law duties to FMC's stockholders. Under Hickman, the transactions themselves were not subject to the fiduciary duty strictures of ERISA. However, like the Nelson option, the apparently fraudulent nature of these transactions from the perspective of FMC's stockholders raises the question whether the ESOP's fiduciaries should have commenced derivative actions challenging this misuse of FMC's assets:

> [T]he basis for this ERISA action is not the perpetration of the fraud on [FMC's] shareholders itself, but the fact that, knowing the Plan's investment had been impaired by their own fraudulent acts, defendants, acting as fiduciaries, failed to take any steps to protect the Plan's assets from dissipation.

Canale v. Yegen, 782 F. Supp. at 968. Because the record on appeal does not reveal whether these issues were properly raised and tried, we leave them open for the district court on remand.

Transaction Not Subject to ERISA.

* When Nick Feilen, A.P.W. and Paul Thielking purchased Harvey Feilen's FMC shares in 1977, Nick borrowed his purchase money from FMC and repaid the loan with his subsequent FMC dividends. A.P.W. and Paul borrowed from Brenton Bank, but FMC repaid the loan, and the Thielkings repaid FMC with their subsequent dividends. Henss structured the transaction.

The district court held that appellees breached their ERISA fiduciary duties by structuring and benefitting from a transaction

that adversely affected FMC's cash flow. We disagree. The ESOP did not participate directly in this transaction--it did not buy or sell shares,[7] it did not lend money to the purchasers, and it received its aliquot share of the subsequent dividends. Under Hickman, defendants' fiduciary duties were not implicated by their corporate actions in acquiring control of FMC and causing it to declare dividends even if those actions indirectly injured the ESOP by adversely affecting FMC's long-term financial health.

IV. Who Were The Responsible Fiduciaries

Nick Feilen and, after May 22, 1982, A.P.W. Thielking were named trustees of the ESOP. As such, they were ERISA fiduciaries because they "jointly and severally [had] authority to control

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[7]Thus, this case is distinguishable from Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978), where defendant violated section 1104 by converting a profit-sharing plan into an ESOP and then using the ESOP's assets to finance his acquisition of control of the company.

and manage the operation and administration of the plan," section 1102(a)(1). The statute also provides that any other person is a fiduciary:

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Section 1002(21)(A).

The district court found that each defendant except CRC was a section 1002(21)(A) fiduciary--A.P.W. and Paul Thielking because as FMC directors they could appoint and remove the ESOP's trustees; Henss and Stephen Thielking because they exercised control in managing ESOP assets and provided investment advice to the ESOP; OHT as the alter ego of Henss; and the other defendants as alter ego corporations. From this general finding, the court held each fiduciary liable for all defendants' breaches of duty. However, one who is an ERISA fiduciary only by reason of section 1002(21)(A) is liable

only "to the extent" he exercises discretionary control, renders investment advice, or has discretionary administration responsibility. See Associates in Adolescent Psychiatry, D.C. v. Home Life Ins. Co., 941 F.2d 561, 569 (7th Cir. 1991), cert. denied, 112 S. Ct. 1182 (1992); Leigh v. Engle, 727 F.2d 113, 133-135 (7th Cir. 1984); 29 C.F.R. section 2509.75-8. Therefore, we must examine whether each defendant was responsible as a fiduciary for each of the Transactions Subject to ERISA.

Henss and Stephen argue that they were not ERISA fiduciaries as a matter of law because they performed only ministerial accounting functions with respect to the ESOP. They rely upon Anoka Orthopaedic Assoc., P.A. v. Lechner, 910 F.2d 514, 517 (8th Cir. 1990), where we held that an outside attorney and a benefits consultant were not fiduciaries when providing the professional services for which they were hired.[8]

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[8]Other cases holding that professionals providing services to employee benefit plans were not fiduciaries include Consolidated Beef Ind., Inc. v. New York Life Ins. Co., 949 F.2d 960, 964-65 (8th Cir. 1991), cert. denied, 112 S. Ct. 1670

Anoka and similar cases only apply when a professional serves the plan in his or her professional capacity. Henss and Stephen provided the ESOP with far more than professional accounting services. As the district court found, they recommended transactions, structured deals, and provided investment advice to such an extent that they exercised effective control over the ESOP's assets, since none of the other corporate insiders had the expertise in accounting and employee benefits law needed to spin the tangled web of transactions at issue. In addition, both were corporate insiders--stockholders in FMC and CRC and partners in Imperial--and they used their

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(1992) (insurance company and its salesman who sold annuities to plan); Associates in Adolescent Psychiatry, 941 F.2d at 568-70 (financial consulting firms); Baxter v. C.A. Muer Corp., 941 F.2d 451, 455 (6th Cir. 1991) (claims processing company); Pappas v. Buck Consultants, Inc. , 923 F.2d 531, 535-37 (7th Cir. 1991) (actuaries); Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 292-94 (7th Cir. 1989); Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1149-51 (3d Cir. 1989) (independent auditors); Yeseta v. Baima, 837 F.2d 380, 386 (9th Cir. 1988) (attorney).

positions of trust and confidence to involve the ESOP in transactions in which they had a personal interest. In these circumstances, we agree with the district court that Henss and Thielking must be held responsible for any breaches of fiduciary duty that occurred in connection with the Transactions Subject to ERISA. Compare Monson v. Century Mfg. Co., 739 F.2d 1293, 1303 (8th Cir. 1984).

However, this analysis will not suffice for OHT. Though Henss was no doubt the dominant partner, this was a firm of outside accountants, not a true alter ego. Accountants who render professional services are not ERISA fiduciaries unless they "transcend the normal role" and exercise discretionary authority. Pappas, 923 F.2d at 538. Moreover, the district court found that the professional accounting services were properly provided; the breaches of duty stemmed instead from the abuse by Henss and Stephen of their dual roles as corporate insiders. Therefore, on remand, the district court should make specific findings as to whether OHT was a fiduciary responsible for transactions tainted by

breach of duty.

Paul Thielking argues that the district court erred in imposing fiduciary duties solely by reason of Paul's and A.P.W.'s status as FMC directors. A director's power to appoint plan trustees makes him a fiduciary, but only "to the extent" he exercises the discretion or control described in section 1002(21)(A). Depending upon the circumstances, the director's duty to monitor the actions of appointed trustees may impose a duty to prevent wrongful conduct. See Leigh v. Engle, 727 F.2d at 133-135; 29 C.R.F. section 2509.75-8. Thus, on remand, the district court should make specific findings as to whether the directors' fiduciary duty was breached with respect to each Transaction Subject to ERISA.

In addition, if the district court determines on remand that any ERISA fiduciary duty was breached by the failure to challenge one or more of the transactions described in The Duty To Challenge Other Transactions section of this opinion, the court will need to determine whether any of the defendants were fiduciaries responsible along with the named trustees for

that conduct.

We agree with the district court that the personal corporations of Henss and Thielking were responsible fiduciaries whenever these individuals were. However, Lakewood Marine Ltd. and Paul W. Thielking, O.D., P.C., were merely corporations that purchased and passively held FMC stock for A.P.W. and Paul Thielking. The leveraged buy-out transaction was not subject to ERISA, and a passive minority stockholder is not, without more, a fiduciary. Thus, we see no basis for holding these corporations liable for any breach of duty, though the district court is free to revisit this question on remand.

V. Were Fiduciary Duties Breached

Section 1104(a)(1) imposes three overlapping duties: the ERISA fiduciary must act "solely in the interest of the participants and beneficiaries" of the plan, "for the exclusive purpose" of providing benefits to them, and "with the care, skill, prudence, and diligence" of a "prudent man acting in a like capacity and familiar with such matters." The district court concluded that appellees breached these fiduciary

duties "when they engaged in transactions affecting the ESOP that involved self-dealing and conflicts of interest."

We disagree that self-dealing and conflicts of interest are per se unlawful conduct by an ESOP fiduciary. Congress has expressly authorized an ESOP to enter into transactions in the employer's stock and with interested parties, including the fiduciary. See pp. 6-7, supra. These are prohibited transactions for other ERISA plan fiduciaries precisely because of the inherent risk of "self-dealing" and "conflicts of interest." Moreover, Congress intended an ESOP to be a "technique of corporate finance." That intent must be recognized in applying the "exclusive purpose" test of section 404(a)(1)--ESOP fiduciaries should not be subject to breach-of-duty liability for investing plan assets in the manner and for the multiple purposes that Congress intended.

These tensions do not leave us hopelessly adrift, for trust law has developed standards of duty applicable to fiduciaries with dual loyalties. In addition to the obligation to act

in the best interests of the trust, "When a fiduciary has dual loyalties, the prudent person standard requires that he make a careful and impartial investigation of all investment decisions." Schaefer v. Arkansas Medical Soc'y, 853 F.2d 1487, 1492 (8th Cir. 1988), citing Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982). Thus, the ESOP fiduciary is not prohibited from being on both sides of a transaction involving the ESOP's assets, but he must serve both masters (or at least the ESOP) with the utmost care and fairness.

Some cases suggest that an ERISA fiduciary facing a conflict of interest situation must resign one of his dual roles to avoid liability under section 1104. See Sommers Drug Stores, 793 F.2d at 1469. However, a strict rule to this effect would conflict with the congressional intent to allow the employer and its insiders to serve as ESOP fiduciaries, even when dealing in the employer's stock. Nevertheless, this case graphically illustrates the risk of liability that ESOP fiduciaries bear when they act with

dual loyalties without obtaining the impartial guidance of a disinterested outside advisor to the plan. Because the potential for disloyal self-dealing and the risk to the beneficiaries from undiversified investing are inherently great when insiders act for a closely held corporation's ESOP, courts should look closely at whether the fiduciaries investigated alternative actions and relied on outside advisors before implementing a challenged transaction. See Donovan v. Cunningham, 716 F.2d at 1467-68, 1474; Newton v. Van Otterloo, 756 F. Supp. 1121, 1128-29 (N.D. Ind. 1991).

Although the district court's legal standard was too broad, we affirm its determination that the fiduciaries responsible for the above-described Transactions Subject to ERISA violated section 1104. The ESOP paid too much for FMC stock purchased, sold FMC stock for less than its price in contemporaneous transactions, sold stock on the eve of large dividends, and paid CRC obligations without consideration. The record demonstrates that the responsible fiduciaries were guilty of reprehensible

self-dealing, not the kind of divided but honest loyalty that Congress intended. Such conduct plainly violated ERISA fiduciary duties.

VI. Questions of Remedy

Section 1109(a) provides that an ERISA fiduciary who breaches any duty is liable to the plan (i) for "any losses to the plan resulting from each such breach," (ii) for "any profits...made through use of assets of the plan by the fiduciary," and (iii) for "such other equitable or remedial relief as the court may deem appropriate." See also House Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 5038, 5100. In this case, all parties appeal the district court's remedy.

Damages.

In a post-trial memorandum, the Secretary urged the district court to award damages against each defendant in the amount of $4,065,727, the ESOP's total investment in its now-worthless FMC stock plus imputed earnings on that investment. The district court awarded no damages, finding that the Secretary failed to prove that defendants' breaches of duty proximately caused

any monetary loss to the ESOP.

Without reaching the question of causation, we reject the Secretary's damage analysis because it is based upon an overly-expansive view of defendants' fiduciary duties under Hickman. However, while defendants are not liable under ERISA for causing FMC to fail, the Secretary did prove that defendants (or at least some of them) violated section 1104 by causing the ESOP to engage in stock transactions that caused specific injury to the ESOP at the time in question. The basic remedy under trust law for such a breach of duty is to "restor[e] plan participants to the position in which they would have occupied but for the breach of trust." Dasler v. E. F. Hutton & Co., 694 F. Supp. 624, 634 (D. Minn. 1988). An appropriate measure of damages for manipulating the price of securities is "the difference between what was paid for the stock, and what would have been paid...had the market price not been manipulated." Donovan v. Bierwirth, 754 F. 2d 1049, 1055 (2d Cir. 1985).

Therefore, although the Secretary presented only an unsound global damage theory, we conclude

that the district court's decision to award no damages overlooked its function "to fashion the remedy best suited to the harm." Garnatz v. Stiefel, Nicolaus & Co., 559 F.2d 1357, 1360 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978). Compare Leigh v. Engle, 858 F.2d 361, 366-67 (7th Cir. 1988). In addition, we agree with the Secretary that, once the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty. See Bogert, The Law of Trusts and Trustees section 871 (2d revised ed. 1982 & Supp. 1991); Leigh v. Engle, 727 F.2d at 138-39; Kim v. Fujikawa, 871 F.2d 1427, 1430-31 (9th Cir. 1989); Donovan v. Bierwirth, 754 F.2d at 1056; Marshall v. Snyder, 572 F.2d 894, 900 (2d Cir. 1978); Schoenholtz v. Doniger, 657 F. Supp. 899, 907 (S.D.N.Y. 1987). As Judge Friendly commented, "Courts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not

done this, everything would have been the same." In re Beck Ind., Inc., 605 F.2d 624, 636 (2d Cir. 1979).

Therefore, on remand the district court must determine the specific damages that resulted from each of the transactions in which ERISA fiduciary duties were breached. Under section 1109(a), damages can result from a financial loss to the plan, such as paying CRC's debt to Central Federal for no consideration; from a profit wrongfully made, such as a fiduciary purchasing FMC stock from the ESOP just before a large cash dividend was paid, without reflecting the dividend in the purchase price; or from a combination of the two, which may result from the manipulation of stock prices.[9] Of course, the measure of such damages need not be exact--

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[9]The district court found that the OHT accountants used appropriate valuation techniques and fairly calculated the fair market value of FMC stock on the dates in question. However, these findings do not rebut the claim that appellees improperly caused loss to the ESOP or profit for themselves by manipulating the 20% minority discount.

"it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

Injunctive relief.

The district court permanently enjoined appellees "from serving directly or indirectly as fiduciaries of any ESOP or ESOT, or any other employee benefit plan covered by ERISA" and "from engaging in any acts that would violate fiduciary duties imposed by ERISA." The district court properly entered a permanent injunction against Henss and Stephen Thielking because they had repeatedly used their fiduciary control over the ESOP's assets to profit from self-dealing. "ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction." Beck v. Levering, 947 F.2d 639, 641 (2d Cir. 1991), cert. denied, 60 U.S.L.W. 3780 (May 19, 1992).

The Secretary argues that the district court erred in refusing to enjoin Henss and Stephen

from providing services to any ERISA plan. This is not a minor issue. Accountants frequently provide professional services to ERISA plans in a non-fiduciary capacity, services that would be barred by the injunction the Secretary seeks. Henss testified that he holds himself out to the public as an ERISA expert and has set up and served over two hundred ESOPs. In other words, the Secretary seeks effectively to put these outside accountants out of business.

The Secretary cites a number of prior cases in which defendants who breached ERISA fiduciary duties were permanently enjoined from acting as service providers. See Beck, 947 F.2d at 640; Whitfield v. Tomasso, 682 F. Supp. 1287, 1306 (E.D.N.Y. 1988); Brock v. Lindemann, No. CA3-84-1814-R (N.D. Tex. Jan. 29, 1987); Brock v. Crapanzano, CA No. 84-1899 (S.D. Fla. July 23, 1986). These cases either did not involve professional service providers, or they involved service providers whose services were found to be less than professional.

In this case, Stephen Thielking competently rendered the professional services that would be

considered ministerial under Anoka. The ESOP was properly structured, the ESOP's books and records were properly maintained, and, most significantly, the accountants' valuations of FMC stock were found to be fair and reasonable. Stephen violated ERISA when he crossed the line from service provider to fiduciary in control of investment decisions, and then allowed his personal stake in the ventures to corrupt his decisions. In these circumstances, we conclude that the district court did not abuse its discretion in limiting the permanent injunction against Stephen to the misconduct proved. As our decision in this case should make clear, the injunction against serving as an ERISA fiduciary and violating ERISA fiduciary duties are broad prohibitions that, if obeyed, will ensure that Stephen complies with the statute.

We reach a different conclusion with regard to Henss, however. Henss was the dominant decision-maker for FMC and the ESOP with respect to all or nearly all the transactions discussed in this opinion. He also holds himself out as an ERISA expert who has structured and provided

other services and advice to hundreds of ESOPs. In addition to engaging in the actionable self-dealing we have described, Henss's trial testimony displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries. For example, Henss stated repeatedly his view that ESOP fiduciaries are exempt from ERISA's "prudent man" rule when investing plan assets in an employer's stock or property.

It is true, as we have recognized throughout this opinion, that Congress intended ESOPs to play a unique role in financing corporate activity. But ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise, and to engage in the transactions here at issue, demonstrate such a fundamental misunderstanding of the ERISA statute, regulations, and case law as to require that he have no further opportunity to subvert this important federal law. Therefore, although we are most reluctant to impose such a stringent limitation on a person's livelihood, we agree with the Secretary that the district court abused

its discretion in not further enjoining Henss from acting as a service provider to ERISA plans.

VII. Conclusion

To summarize, we affirm the district court's judgment that Henss and Stephen Thielking, and their personal corporations, breached their ERISA fiduciary duties in causing the ESOP to engage in the above-described Transactions Subject to ERISA, and we affirm the district court's permanent injunction against Stephen Thielking and Stephen K. Thielking, C.P.A., P.C. We modify the permanent injunction against John Henss and John L. Henss, C.P.A., P.C., to further enjoin them from acting as a service provider to any ERISA plan. We reverse the district court's finding that the Transaction Not Subject to ERISA was subject to ERISA fiduciary duties. We remand to the district court for further consideration of whether OHT, A.P.W. and Paul Thielking, and the other corporate defendants were fiduciaries who breached fiduciary duties with respect to the Transactions Subject to ERISA; whether any of the defendants breached fiduciary duties by not causing the ESOP to challenge one or more or the

Other Transactions described in the Duty To Challenge section of this opinion; and the damages, if any, recoverable on behalf of the ESOP with respect to each breach of fiduciary duty. We leave to the district court's discretion whether these additional inquiries require a new trial or a reopening of the evidentiary record.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1086/1295SIDM

Roderick DeArment, etc.,	*	
	*	
Appellant,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Harvey N. Feilen, et al,	*	Suggestion for
	*	Rehearing En
Banc		
Appellees.	*	

The suggestion for rehearing en banc is denied.

The petition for hearing is also denied.

July 14, 1992

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit